Supreme Court, U.S.
FILED
JUN 9 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. ~~79-~~1939

RUDOLPH C. VARA, ET AL.,

Appellants,

v.

CITY OF HOUSTON, ET AL.,

Appellees.

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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June 1980

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Appellees.

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

Rudolph C. Vara, Dr. Clifton Washington, II, Edward Small, Marvin C. Delaney, Kathleen Douglas, Joel Luedeman, Ann Luedeman and Linda Susan Jackson, appellants, appeal from the final judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas dated June 20, 1979 affirming the denial of writ of mandamus. Said judgment became final upon denial of appellants' motion for reconsideration by the Supreme Court of the State of Texas entered in this action on March 12, 1980.

Appellees in this action consist of: the City of Houston, Mayor Jim McConn, Councilmen Johnny Goyen, Frank Mann, Jim Westmoreland, Judson Robinson, Jr., Larry McKaskle, Louis Macy, Homer Ford and City Secretary Anna Russell.

Appellants' submit this jurisdictional statement to show that this honorable Supreme Court has jurisdiction to hear this appeal and that a substantial consitutional question is presented.

OPINIONS BELOW

The opinion of the Court of Civil Appeals, which appears in the appendix hereto, at 18a, is reported at 583 S.W.2d 935 (1979).

The order of the Texas Supreme Court denying appellants' motion for reconsideration entered March 12, 1980 is unreported. A notice letter from the clerk of the Texas Supreme Court certifying the order is set out in the appendix hereto at 27a.

Judgment of the 190th District Court of Harris County, at Houston, Texas, entered in this action on July 21, 1978, denying appellants' application for writ of mandamus is unreported. Said judgment, findings of fact and conclusions of law made by said trial court are reprinted in the appendix hereto at 1a.

JURISDICTION

The judgment of the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas, entered June 20, 1978, affirming the denial of appellants' application for a writ of mandamus is the subject of this appeal.

Appellants sought the discretionary review of the Supreme Court of Texas by submitting an application for writ of error, which was refused with the notation: no reversible error. Appellants' motion for reconsideration was denied on March 12, 1980.

Notice of appeal to this court was filed in the Court of Civil Appeals for the Fourteenth Supreme Judicial District of Texas on May 30, 1980.

This appeal is being docketed in this Court within 90 days from the denial of reconsideration below. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2), and is supported by the following decisions which allow appeal from the opinion and judgment of an intermediate appellate court: *Michigan - Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 98 L.Ed. 583, 74 S.Ct. 396, reh.den. 347 U.S. 391, 98 L.Ed.

1083, 74 S.Ct. 528 (1954); *Sullivan v. Texas,* 207 U.S. 416, 52 L.Ed. 274, 28 S.Ct. 215 (1908).

QUESTION PRESENTED

Whether the disannexation by petition procedure required by Articles 1175 and 970a, Tex. Rev. Civ. Stat. Ann. (1963) as applied to appellants by the Court of Civil Appeal violates the equal protection clause of the Fourteenth Amendment of the United States Consitution because Article 970a places upon the right to petition for disannexation the requirement that the petition be signed by the owners of at least fifty per cent (50%) of the land in the area to be disannexed.

CONSTITUTIONAL PROVISIONS AND STATE STATUTES

Fourteenth Amendment, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1175, Vernon's Ann. Civ. St., Vol. 2B, Pg. 79:

Cities adopting the charter or amendment hereunder shall have full power of local self-government, and among the other powers that may be exercised by any such city the following are hereby enumerated for greater certainty . . .

> 2. The power to fix the boundary limits of said city, to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said city, to provide for the disannexation of territory within such city and to provide for the exchange of territory with other

cities or towns, according to such rules as may be provided by said charter not inconsistent with the procedural rules prescribed by the Municipal Annexation Act. (Article 970a).

Article 970a, Sec. 10.A., Vernon's Ann. Civ. St., Vol. 2A, Pg. 60:

From and after the effective date of this Act, any city annexing a particular area shall within three (3) years of the effective date of such annexation provide or cause to be provided such area with governmental and proprietary services, the standard and scope of which are substantially equivalent to the standard and scope of governmental and proprietary services furnished by such city in other areas of such city which have characteristics of topography, patterns of land utilization, and population density similar to that of the particular area annexed. In the event a city fails or refuses to provide or cause to be provided such services within the time specified herein, a majority of the qualified voters residing within such particular annexed area and the owners of fifty percent (50%) or more of the land in such particular annexed area, which area must adjoin the outer boundaries of the city, may petition the governing body of such city to disannex such particular annexed area. Should the governing body of such city fail or refuse to disannex such particular annexed area within ninety (90) days after receipt of a valid petition, any one or more of the signers of such petition may, within sixty (60) days of the date of such failure or refusal, file in a district court of the district in which such city is located an action requesting that the particular annexed area be disannexed. Upon the filing of an answer in such cause by the governing body of such city, and upon application of either party, the case shall be advanced and heard without further delay, all in accordance with the Texas Rules of Civil Procedure. Upon hearing of the case, if the district court finds that a valid petition was filed with the city, that the particular annexed area is otherwise eligible for disannexation under the provisions of this

Section, and that the standard and scope of governmental and proprietary services provided or caused to be provided to such particular annexed area are not substantially equivalent to the standard and scope of governmental and proprietary services provided or caused to be provided other areas of such city having characteristics of topography, patterns of land utilization and population density similar to that of the particular annexed area, it shall enter an order disannexing such particular annexed area. Provided, however, that the right of disannexation provided for in this Section shall not be available to any particular annexed area which was lawfully within the city limits of a city at the time of the approval or sale of any general obligation bonds of the city if proceeds therefrom have been expended for capital improvements to serve such particular annexed area, so long as any such bonds are outstanding.

Charter of the City of Houston:

Article VIIb. Initiative and Referendum.

Sec. 1. General power.

The people of Houston, in addition to the method of legislation hereinbefore provided, shall have the power of direct legislation by the initiative and referendum.

Sec. 2. The initiative.

The initiative shall be exercised in the following manner:

(a) *Petition.* A petition signed and verified in the manner and form required for recall petition in Article VIa by qualified electors equal to 15 per cent of the total vote cast at the democratic primary for the nomination of Mayor and Commissioners, next preceding the filing of said petition, accompanied by the proposed legislation or measure in the form of a proposed ordinance or resolution, and requesting that such or-

dinance or resolution be submitted to a vote of the people, if not passed by the Council, shall be filed with the Secretary.

(b) *Secretary's certificate.* Within five days after the filing of such petition the Secretary shall certify the number of votes cast at the democratic primary for nomination of Mayor and Commissioners, next preceding the filing of said petition, and the number of signers of such petition, and shall present said certificate, petition and proposed ordinance or resolution to the Council.

(c) *Action by the council upon petition.* If such petition be signed, as in the charter provided, by qualified electors equal to 15 per cent of the total vote cast at the democratic primary for the nomination of Mayor and Commissioners next preceding the filing of such petition, the Council, within ten days after the receipt thereof, except as otherwise provided in this Charter, shall either pass such ordinance or resolution without alteration, or submit it to the popular vote at a special election, which must be held within thirty days after the date of the ordering thereof; provided, however, that if any other municipal election is to be held within sixty days after the filing of the petition said proposed ordinance or resolution shall be submitted without alteration to be voted upon at such election.

Article V. Officers and Elections

Sec. 10. Number of signatures on recall, initiative and referendum petition.

The number signatures required for the petitions provided for in Articles VIIa and VIIb of this Chapter shall be calculated upon the greatest total vote cast for Mayor at any City Primary or City General Election held within the three years next preceding the date of the filing of such petitions.

STATEMENT OF THE CASE

Appellant brought this action on behalf of approximately 55,000 residents of the City of Houston, who had signed a petition to initiate a city ordinance to disannex a portion of the City. The petition had been circulated pursuant to the Charter of the City of Houston which provides for the power of direct legislation by the initiative and referendum. The petition complied with all requirements of the Houston City Charter.

Appellants sought a writ of mandamus to compel the City, its mayor, city council and secretary to either pass the disannexation ordinance without alteration or to submit the proposal to the electorate. The trial court denied appellants' application for writ of mandamus.

The Court of Civil Appeals, in affirming the denial of writ of mandamus, held that the only method by which a home rule city may disannex territory is to follow the procedure set out in Article 970a Section 10.A. This procedure requires, inter alia, that a petition be submitted to the city council signed by a majority of the qualified voters residing within the area to be disannexed and by the owners of fifty percent (50%) or more of the land in such area.

The Supreme Court of Texas declined to review the Court of Civil Appeals opinion by refusing Appellants' application for writ of error with the notation: no reversible error. On March 12, 1980, the Texas Supreme Court denied Appellants' motion for reconsideration without rendering an opinion.

HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED

The constitutional question was initially presented in appellants' motion for reconsideration submitted to the Texas Supreme Court. While the general rule is that the raising of a constitutional question is untimely where the question is raised in a motion for reconsideration, there is a well established exception where the opinion of the highest state court unexpectedly gives rise to a constitutional question. *Herndon v. Georgia,* 295 U.S. 441, 79 L.Ed. 1530, 55 S.Ct. 794 (1935); *Brinkerhoff-*

Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 74 L.Ed. 1107, 50 S.Ct. 451, (1930); *Missouri ex rel. Missouri Ins. Co. v. Gehner,* 281 U.S. 313, 74 L.Ed. 870, 50 S.Ct. 326 (1930); *Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.,* 281 U.S. 74, 74 L.Ed. 710, 50 S.Ct. 228 (1930).

The Court of Civil Appeals opinion constitutes the opinion of the highest state court by virtue of the Texas Supreme Court's refusal to review the opinion. *Michigan-Wisconsin Pipe Line Co. v. Calvert,* supra. *Sullivan v. Texas,* supra. In that opinion, the Court of Civil Appeals unexpectedly gave a new construction to Articles 1175 and 970a which held that the procedure set out in Article 970a is the *only* procedure by which a home rule may disannex territory. The constitutional question could not have raised prior to this opinion, since before this statutory construction the question would have been speculative.

In their application for writ of error before the Texas Supreme Court, appellants contended that the interpretation of Articles 1175 and 970a rendered by the Court of Civil Appeals was erroneous in declaring that Article 970a set forth the only procedure for disannexation. It was not incumbent on the appellants to concede the Court of Civil Appeals interpretation before the Texas Supreme Court and then assert that the required disannexation procedure was violative of the Fourteenth Amendment of the United States Constitution. As expressed by Justice Cardozo in his dissent in *Herndon v. Georgia,* supra, at p. 452:

> "He was not under a duty to put before his judges the possibility of a definition less favorable to himself, and make an argument against it, when there had been no threat of any change, still less any forecast of its form or measure. He might wait until the law of the case had been rejected by the reviewing court before insisting that the effect would be an invasion of his constitutional immunities. If invasion should occur, a motion for rehearing diligently pressed thereafter would be seasonable notice. This is the doctrine of *Missouri v. Gehner* and *Brinkerhoff-Faris Co. v. Hill.* It is the doctrine that must prevail if the great securities of the Constitution are not to be lost in a web of

procedural entanglements."

After the Texas Supreme Court declined to review the Court of Civil Appeals opinion, appellants forthwith submitted their motion for reconsideration which clearly and distinctly set forth the constitutional question for that Court's consideration. The constitutional point contained in said motion is set forth in the appendix hereto. The failure of the Texas Supreme Court to issue an opinion in denying appellants' motion for reconsideration cannot defeat the right of the appellants to present this constitutional question to this honorable Supreme Court. *Lawrence v. State Tax Commission of Mississippi,* 286 U.S. 276, 76 L.Ed. 1102, 52 S.Ct. 556 (1932).

It was stipulated by the parties and found by the Court of Civil Appeals that appellants did not comply with the procedure required by Article 970a. This finding does not provide an adequate non-federal ground for the Court of Civil Appeals decision. It has long been held by this Court that where a state statute is unconstitutional on its face, appellants' failure to attempt compliance with the state statute is an inadequate non-federal ground. *Staub v. Baxley,* 355 U.S. 313, 2 L.Ed. 2d 302, 78 S.Ct. 277 (1958).

For the reasons above-stated, the constitutional question was timely raised and is properly presented for consideration by this Supreme Court of the United States.

THE QUESTION IS SUBSTANTIAL

The right to vote and participate in public political action is one of the most precious and guarded rights enjoyed by the people of the United States. This Court has vowed to protect this right against all attempts to subvert it. *Harper v. Virginia Board of Elections,* 383 U.S. 663, 16 L.Ed.2d 169, 86 S.Ct. 1079 (1966); *Westberry v. Sanders,* 376 U.S. 1, 11 L.Ed.2d 481, 84 S.Ct. 526 (1964). Both the right to participate in public action by petition and the right to vote in public elections are rights fundamental to a democratic form of government. As cognate rights, the restrictions placed upon them should be subject to the same careful scrutiny. *Kramer v. Union Free School District No. 15,*

395 U.S. 621, 23 L.Ed.2d 583, 89 S.Ct. 1889 (1969) at 626; *D.C. Fed'n of Civic Ass'ns, Inc. v. Volpe,* 434 F.2d 436 (D.C. Cir. 1970) at 442.

In the case at bar, the right to disannex by public petition is being threatened by a statutory restriction which requires the petition to be signed by the owners of at least fifty per cent (50%) of the land in the area to be disannexed and by a majority of the qualified voters in such area.

In Articles 1175 and 970a, the State grants the right to disannex by public petition then seeks to place severe landownership restrictions on the exercise of that right.

In elections of general interest, restrictions on the franchise other than residence, age, and citizenship must promote a compelling state interest. More specifically, restriction based upon ownership of land are subject to strict constitutional scrutiny. *Kramer v. Union Free School District No. 15,* supra. In addition, it must be shown that non-property owners are substantially less interested in the subject matter of the public action in order to justify the restriction. *Phoenix v. Kolodziejski,* 399 U.S. 204, 26 L.Ed.2d 523, 90 S.Ct. 1990 (1970).

This Court held invalid voting restrictions based upon property ownership in a local school board election, *Kramer v. Union Free School District No. 15,* supra; in a local revenue bond election, *Cipriano v. City of Houma,* 395 U.S. 701, 23 L.Ed.2d 647, 89 S.Ct. 1897 (1969); and in a local general obligation bond election, *Phoenix v. Kolodziejski,* supra. Clearly, disannexation would qualify as a matter of general interest; for all residents of the area to be disannexed would be substantially affected.

In *Stone v. Hill,* 421 U.S. 289, 44 L.Ed.2d 172, 95 S.Ct. 163, reh. den. 422 U.S. 1029, 45 L.Ed.2d 686, 95 S.Ct. 2617 (1975), a "dual box" system devised by the Texas Attorney General was held unconstitutional. Under this system persons who had rendered property for taxation registered their votes in one box and all other persons registered their votes in another box, and the proposal had to be approved by a majority vote in both the "renderer's box" and in the aggregate of both boxes. This system effectively gave persons who had rendered property for

taxation a veto power in all bond elections.

The procedural petition requirements in Article 970a give a similar veto power in disannexation actions to owners of land in the area to be disannexed by requiring the petition to be signed by "a majority of the qualified voters residing within such particular annexed *and* the owners of fifty per cent (50%) or more of the land in such particular annexed area." Thus, because of the absence of a compelling state interest and the lack of any substantial difference in the interests of landowners and non-landowners in disannexation actions, the Article 970a procedure required by the Court of Civil Appeals is violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution. Indeed, a United States District Court in South Carolina has held that similar procedure, used in annexation actions, is unconstitutional on the above-stated grounds. *Hayward v. Edwards,* 456 F. Supp. 1151 (D.C.S.C. 1977).

CONCLUSION

For these reasons, the constitutional question presented is so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution. Wherefore appellants respectfully pray, this Court note probable jurisdiction of this appeal.

Respectfully submitted,

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June 4, 1980

APPENDIX

NO. 78-14,724

Rudolph C. Vara et al.	§	In The District Court
VS.	§	Of Harris County, Texas
The City Of Houston, Texas et al.	§	190th Judicial District

JUDGEMENT

BE IT REMEMBERED THAT on May 18, 1978 the above styled and numbered cause came on for hearing before this court, the Plaintiffs Rudolph C. Vara, et al. appearing by and through their attorneys and defendant, City of Houston, et al. appearing by and through their attorneys. Both parties announced ready for trial and after presentation of testimony evidence, and arguments of counsel, the Court is of the opinion that as a matter of law, the application for writ of mandamus should be denied. Accordingly, it is therefore ORDERED, ADJUDGED and DECREED.

That Plaintiffs' application for writ of mandamus be in all things denied.

Further, it is ordered, adjudged and decreed that all relief sought through Plaintiffs' original petition be in all things denied,

It is further ordered that all costs be taxed to the Plaintiff.

SIGNED on July 21, 1978.

/s/ Hon. Wyatt H. Heard
JUDGE
190th District Court
Harris County, Texas

ENTERED on _____, 1978

_____

CLERK
190th District Court
Harris County, Texas

APPROVED:

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City Attorney

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NO. 78-14,724

Rudolph C. Vara, et al.	§	In The District Court Of
	§	
V.	§	Harris County, Texas
	§	
City Of Houston, et al.	§	190th Judicial District

FIRST AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 296 and 298, Texas Rules of Civil Procedure, the Court herewith enters the following Findings of Fact and Conclusions of Law in support of its judgment for Defendant and in place of the "Findings of Fact and Conclusions of Law" previously entered by the Court on September 5, 1978.

FINDINGS OF FACT

FF-1

The Defendants in this action are: (1) the City of Houston, Texas (the "City"), a municipal corporation and home rule city principally situated in Harris County, Texas; (2) the Mayor of the City; (3) the members of the City Council of the City; and (4) the City Secretary of the City. All Defendants received service of process and appeared and answered herein.

FF-2

Upon third and final reading of City of Houston Ordinance No. 77-1668, effective November 23, 1977, the City extended its limits and annexed approximately 13.77 square miles of territory in southeast Harris County near the Lyndon B. Johnson Space Center (the "Clear Lake Area").

FF-3

The Clear Lake Area contains extensive urban development including thousands of structures (both residential and commercial), water distribution facilities, sewer facilities, gas distribu-

tion facilities, electrical power facilities, and an extensive network of paved streets and major thoroughfares. Approximately 20,000 persons reside in the Clear Lake Area. Part of the Clear Lake Area is unimproved property. Part of the unimproved property is located adjacent to the boundaries of the City as they existed on March 10, 1978.

FF-4

Most of the property within the Clear Lake Area is subject to ad valorem taxation by the City. The Lyndon B. Johnson Space Center of the National Aeronautics and Space Administration and the campus of the University of Houston at Clear Lake City are in the Clear Lake Area.

FF-5

The City is providing municipal services such as fire protection and police protection within the Clear Lake Area.

FF-6

The City has begun a capital improvement program within the Clear Lake Area to provide services to the Clear Lake Area.

FF-7

As part of its capital improvment program, the City purchased a fire station site in the Clear Lake Area for $124,140.00 on February 1, 1978.

FF-8

On May 9, 1978, the City awarded a contract for improvements to the fire station site in the Clear Lake Area at a cost of $57,664.00.

FF-9

The moneys used to acquire and improve the fire station site in the Clear Lake Area were obtained from the last preceding sale of the City's Public Improvement Bonds which are payable

from, and secured by, ad valorem taxes on property within the City, including property within the Clear Lake Area.

FF-10

The last preceding sale of the City's Public Improvement Bonds occurred on December 14, 1977, some 21 days after the passage of the ordinance annexing the Clear Lake Area.

FF-11

The December 14, 1977 bond sale included $1,500,000 in bonds for providing, improving and equipping buildings and facilities for Fire Department purposes, and acquiring lands and rights-of-way for any of such purposes, and all matters necessary or incidental thereto.

FF-12

The Plaintiffs in this action are residents and qualified electors of the City who signed a petition (the "Initiative Petition") which included a draft ordinance seeking to detach and disannex territory from the City of Houston (the "Draft Ordinance"). The Plaintiffs and Rudolph C. Vara (who resides at 1146 Majestic), Dr. Clifton Washington, II, Edward Small, Marvin C. Delaney, Kathleen Douglas, Joel Luedeman, Ann Luedeman and Linda Susan Jackson, with addresses as set out in Plaintiffs' Original Petition.

FF-13

The Initiative Petition consisted of 682 separate documents, each of which was signed by qualified voters of the City, aggregating a number which exceeds fifteen percent of the greatest total vote cast for Mayor at any City primary or City general election held within the three years next preceding the date of the filing of such petition. The eight Plaintiffs are among the signers. Some of the signers of the Initiative Petition (and some of the Plaintiffs) reside in the Clear Lake Area; the rest reside in the balance of the City.

FF-14

All of the Plaintiffs signed the petition within thirty days prior to its being filed with the City Secretary of the City. The petition was filed March 10, 1978.

FF-15

The City Secretary of the City, within five days after the filing of the Initiative Petition with her, certified the number of signers on the Initiative Petition and the greatest number of votes cast at a City election within three years preceding the date of the filing of such petition to the City Council of the City.

FF-16

The City Council of the City neither enacted the Draft Ordinance without alteration nor submitted it to the electorate at a special election within ten days after the Initiative Petition and City Secretary's certificate were filed with it.

FF-17

The City Council of the City adopted Resolution No. 78-15 on March 22, 1978, setting forth reasons for neither enacting the Draft Ordinance nor submitting it to the electorate.

FF-18

The chronology of events relating to the expenditure of bond funds by the City in the Clear Lake Area, up to the date of trail, is as follows:

November 23, 1977 — third and final reading of City of Houston Ordinance No. 77-1688 (annexing the Clear Lake Area).

December 14 1977 — passage of City of Houston Ordinance No. 77-2621 (ordering the sale of $50,000,000 of Public Improvement Bonds).

January 4, 1978 — passage of City of Houston Ordinance No. 78-15 (appropriating $124,792.50 out of the Public Improvement Bonds to acquire a fire station site in the

Clear Lake Area).

February 1, 1978 — execution of a deed to the City (as grantee) for the fire station site in the Clear Lake Area.

March 10, 1978 — filing of the Initiative Petition.

May 9, 1978 — passage of City of Houston Ordinance Nos. 78-944 (appropriating $66,315.00 out of the Public Improvement Bonds for improvements to the fire station site in the Clear Lake Area) and 78-945 (awarding a contract for improvements to the fire station site in the Clear Lake Area for $57,664.00).

May 18, 1978 — trial of this lawsuit.

FF-19

The Draft Ordinance purports to describe territory for disannexation by the use of two field note descriptions: (1) an attempted description of a large tract and (2) a description of a smaller exclusion tract. There is also attached to the Draft Ordinance a sketch purporting to describe the boundary of the area described for disannexation.

FF-20

The attempted description of the large tract in the Draft Ordinance is a broken, discontinuous line. At least one expert witness testified that the description contained a void or gap roughly 7,000 feet in width.

FF-21

The attempted description of the large tract in the Draft Ordinance does not form a closure, and therefore, such large tract cannot be located with certainty, based upon the map of the large tract.

FF-22

The description of the smaller exclusion tract in the Draft Ordinance can be located with certainty.

FF-23

Because the attempted description of the large tract in the Draft Ordinance does not form a closure and cannot be located, the entire description (composed of the large tract and the smaller exclusion tract) cannot be located with certainty for any purpose.

FF-24

Because the territory purportedly described in the Draft Ordinance cannot be located with certainty, the City of Houston would be unable to locate all of its remaining territory with certainty if the Draft Ordinance were to take effect.

FF-25

The attempted description of territory in the Draft Ordinance expressly by-passes a tract of land in the Clear Lake Area adjacent to the Lyndon B. Johnson Space Center, such tract consisting of roughly 50 acres and containing a hotel establishment, apartment buildings, and other improvements.

FF-26

If the Draft Ordinance were to become effective, and even assuming that it describes some territory, the by-passed tract described above in FF-25 would become an island of incorporated territory within the boundaries of the City but unconnected to, non-contiguous with, and non-adjacent to the main body of the City's incorporated territory.

FF-27

Assuming that the description in the proposed disannexation ordinance were to form a closure and were to describe territory in the manner contended by plaintiffs, then such territory is approximately the same territory as the Clear Lake Area.

FF-28

Even if the description contained in the Draft Ordinance were

Next Page is No. 12a

to form a closure and describe some tract of land, such tract would of necessity contain improved land taxable to the City.

FF-29

No city-wide election in the City of Houston is presenty scheduled until the general election of 1979. The cost of a city-wide election exceeds $300,000.00.

CONCLUSIONS OF LAW

CL-1

The City is a municipal corporation and home rule city existing under the authority of Article XI, Section 5 of the Texas Constitution.

CL-2

The City Council is the governing body of the City and exercises those powers granted to it pursuant to Article XI, Section 5 of the Texas Constitution, the general and special laws of the State of Texas and the Charter of the City of Houston.

CL-3

Under Article XI, Section 5 of the Texas Constitution, the City, acting through its City Council or acting through its initiative procedures, may adopt only those ordinances that are consistent with the Constitution and general laws enacted by the Texas Legislature.

CL-4

There is no provision in the Charter of the City of Houston which authorizes disannexation of territory.

CL-5

The Legislature of the State of Texas has enacted only three statutes governing disannexation of territory by the City, such statutes being:

(1) Article 1266, TEX. REV. CIV. STAT. ANN. ("Article 1266" hereinafter)

(2) Article 1175(2), TEX. REV. CIV. STAT. ANN. ("Article 1175(2)" hereinafter)

(3) Article 970a, TEX. REV. CIV. STAT. ANN. ("Article 970a" hereinafter).

CL-6

Because the Clear Lake Area is not only improved but is also taxable to the City, Article 1266 neither applies to nor authorizes a disannexation of such area.

CL-7

Article 1175(2), TEX. REV. CIV. STAT. ANN., grants to the City the power to disannex territory, but only in accordance with the "procedural rules" of Article 970a.

CL-8

The "procedural rules" of Article 970a relating to disannexation appear in Section 10 thereof and require, *inter alia,* the following steps:

(1) The elapse of three years from the date of annexation before the area may be subject to disannexation,

(2) the failure by annexing city to provide municipal services substantially equivalent to services provided to other areas within such city,

(3) submission of a petition to the governing body of the annexing city, such petition containing the following:

(a) the signatures of a majority of the qualified voters in the annexed area, each such signature being accompanied by the signer's address, precinct number and voter registration certificate number,

(b) the signatures of the owners of a majority of the land in the annexed area, each such signature being accomplished by the approximate total acreage owned by such signer, and

(c) a description and a plat of the annexed area,

(4) notice must be given by posting and publication before the petition may be circulated,

(5) proof of notice must accompany the petition when it is filed,

(6) the governing body may disannex the area previously annexed only after receipt of a valid petition,

(7) should the governing body fail or refuse to disannex within 90 days after receipt of the petition, any of the petition's signers may file suit in district court seeking to disannex the area previously annexed, and

(8) the district court may then order that the area be disannexed, but only if the court finds:

(a) that a valid petition was filed,

(b) that the area is eligible for disannexation under Section 10 of Article 970a, and

(c) that municipal services in the annexed area are not substantially equivalent to services provided to other similar areas within the annexing City.

CL-9

The Plaintiffs in this action have failed to show compliance with any of steps "(1)" through "(5)" for disannexation described above in Conclusion of Law No. 8.

CL-10

The Plaintiffs in this action have failed to show either actual or substantial compliance with the procedural rules for disannexation of territory set out in Section 10 of Article 970a.

CL-11

With regard to the Clear Lake Area, there has been no compliance, either actual or substantial, by any of the Plaintiffs, or by any signer of the Initiative Petition, with the procedural rules for disannexation prescribed by Article 970a.

CL-12

With regard to the Clear Lake Area, the disannexation procedures of Article 970a may not be invoked until the elapse of three years after its annexation, and such three years will not have elapsed until the year 1980.

CL-13

The City's City Council lacks the power to disannex the Clear Lake Area until three years have elapsed after annexation, and only then will it have the power if the other procedural rules of Article 970a have been complied with.

CL-14

The City Council has no lawful authority to disannex improved, taxable property unless it is presented with a petition complying with the procedural rules of Article 970a.

CL-15

The attempted description of land in the Draft Ordinance bypasses and does not inlcude a tract of land approximately 50 acres in size which is within the Clear Lake Area. Therefore, if the Draft Ordinance were to become effective, it would divide the existing territory of the City into two non-contiguous and non-adjacent parts (one of which would be the 50-acre bypassed tract).

CL-16

No home rule Texas city may exist in two or more noncontiguous, non-adjacent parts and any ordinance attempting to divide a home rule city is void. The Draft Ordinance, if it were enacted, would be void.

CL-17

The Draft Ordinance can never have any legal effect because it does not contain a description of territory which closes or which can be located with certainty. Therefore, to enact it, or to call an election to consider it, would be a useless, futile act.

CL-18

The City Council of the City may not be compelled by mandamus to perform a useless, futile act.

CL-19

Disannexation of territory under Article 1175(2) is a quasi-judicial function which cannot be performed by the electorate at large, because such function includes detailed findings and analyses of facts, as set out in the procedural rules of Article 970a.

CL-20

The City has no inherent power to disannex territory, such power may only be derived from its Charter or the Constitution and Laws of the State of Texas.

CL-21

Article VIIb, Section 2(c) of the Charter of the City of Houston, Texas, restricts the scope of the exercise of the power of initiative by its citizens to those powers that are possessed by the City Council through the requirement that initiative ordinances be first submitted to the City Council for enactment.

CL-22

Because the Draft Ordinance is inconsistent with the general laws of the State, neither the City's City Council nor its electorate has any lawful authority to adopt such an ordinance.

CL-23

The signers of the Initiative Petition have not lawfully invoked the power of initiative reserved to the people under Article VIIb, Section 2(c) of the Charter of the City of Houston, Texas, because they have submitted a draft ordinance to the City Council that requires such Council to enact an ordinance inconsistent with the general laws of Texas, to-wit: Article 970a, Article 1175(2) and Article 1266.

CL-24

The Plaintiffs, having failed to invoke the initiative power under Article VIIb, Section 2(c) of the Charter of the City of Houston, have not demonstrated the existence of a vested right to compel the Defendant to enact the Draft Ordinance or conduct an election.

CL-25

The members of the City Council of the City of Houston, as elected officers, have an obligation under Article XVI, section 1, and Article XI, Section 5 of the Texas Constitution to enact only those ordinances consistent with the general laws of Texas and therefore have no duty to enact the Draft Ordinance which is inconsistent with the general laws of this state.

CL-26

Because the Clear Lake Area was lawfully within the City's limits at the time that the City Council approved and sold public improvement bonds, proceeds of which were expended for capital improvements to serve the Clear Lake Area (to-wit: a fire station), no right of disannexation exists under Section 10 of Article 970a as long as any of such bonds are outstanding.

CL-27

The City's City Council may not be compelled by mandamus to enact an ordinance or to submit an ordinance to the electorate when such ordinance is inconsistent with the general laws of the State of Texas.

SIGNED AND ENTERED this the 26th day of October, 1978.

/s/ Wyatt H. Heard
JUDGE PRESIDING

Affirmed, and Opinion filed June 20, 1979.

RUDOLPH C. VARA, ET AL.,

Appellants,

vs.

THE CITY OF HOUSTON, ET AL.,

Appellees.

Appeal from 190th District Court
of Harris County

Rudolph C. Vara and seven other named plaintiffs (appellants) brought this class action on behalf of approximately 55,000 residents of the City of Houston (the City), all of whom had signed a petition to initiate a city ordinance to disannex a portion of the City referred to as the Clear Lake City area. Appellants sought a writ of mandamus to compel the City, its mayor, city council, and secretary (appellees) to either pass the disannexation ordinance without alteration or to submit the proposal to the electorate. The trial court, after a hearing, denied the writ.

The charter of the City provides that "[t]he people of Houston . . . shall have the power of direct legislation by the initiative and referendum." CHARTER, HOUSTON, art. VIIb §3. With regard to the use of the initiative, the charter reads as follows:

> The initiative shall be exercised in the following manner:
>
> (a) *Petition.* A petition signed and verified in the manner and form required for recall petition in Article VIa* by qualified electors equal to 15 per cent of the total vote cast at the democratic primary for the nomination of mayor and commissioners, next preceding and filing of

said petition, accompanied by the proposed legislation or measure in the form of a proposed ordinance or resolution, and requesting that such ordinance or resolution be submitted to a vote of the people, if not passed by the council, shall be filed with the secretary.

(b) *Secretary's certificate.* Within five days after the filing of such petition the secretary shall certify the number of votes cast at the democratic primary for nomination of mayor and commissioners, next preceding the filing of said petition, and the number of signers of such petition, and shall present said certificate, petition and proposed ordinance or resolution to the council.

(c) *Action by the council upon petition.* If such petition be signed, as in the Charter provided, by qualified electors equal to 15 per cent of the total vote cast at the democratic primary for the nomination of mayor and commissioners next preceding the filing of such petition, the council, within ten days after the receipt thereof, except as otherwise provided in this Charter, shall either pass such ordinance or resolution without alteration, or submit it to the popular vote at a special election, which must be held within thirty days after the date of the ordering thereof; provided, however, that if any other municipal election is to be held within sixty days after the filing of the petition said proposed ordinance or resolution shall be submitted without alteration to be voted upon at such election.

The parties have stipulated that appellants have complied with all procedural requirements for exercise of the initiative process under the charter. The parties also stipulated that the appellees refused, and continue to refuse, to pass the ordinance or to order an election.

The Texas Supreme Court has outlined the standard of review to be applied in determining whether mandamus should issue to compel a city to take action on an initiative petition. In *Glass v. Smith,* 244 S.W.2d 645 (Tex. Sup. 1951), the respondents, signers on an initiative petition, were seeking a writ of man-

damus to compel petitioners, the city council, the city manager, and the city clerk of the City of Austin, to hold an election on a proposed ordinance classifying policemen and firemen. The court held that

> "to entitle respondents to a writ of mandamus on the ground that they have a legal right to have the election called and held and that petitioners are under a legal duty to hold it, it is not enough that the subject matter of the proposed ordinance be legislative in character *but it must also appear that the subject matter of the ordinance has not been withdrawn from the field in which the initiatory process is operative.*"

Id. at 648 (emphasis added). In determining whether the subject matter of the proposed ordinance in *Glass* had been withdrawn from the scope of the initiatory process, the supreme court posed this question: "Has the subject matter of the proposed ordinance been withdrawn, *expressly or by necessary implication,* by either the general law or the City Charter from the field in which the initiatory process is operative?" *Id.* at 650 (emphasis added). Neither the appellants nor the appellees in the case at bar contend that any provision of the City Charter either expressly or by necessary implication withdraws the subject matter of the proposed ordinance from the scope of the initiatory process. Thus the issue is narrowed to whether some provision or provisions of the general laws removes from the initiatory process the proposed ordinance to disannex the Clear Lake City area.

Article 1175, TEX. REV. CIV. STAT. ANN. (1963), sets forth the enumerated powers of a home rule city, such as the City of Houston, and provides in relevant part as follows;

> Cities adopting the charter or amendment hereunder shall have full power of local self government, and among the other powers that may be exercised by any such city the following are hereby enumerated for greater certainty . . .
>
> 2. The power to . . . provide for the disannexation of territory within such city . . . according to such rules as may

> be provided by said charter *not inconsistent with the procedural rules prescribed by the Municipal Annexation Act.*

TEX. REV. CIV. STAT. ANN. art. 1175(2) (1963) (emphasis added). Pursuant to article 1175(2) the city would be empowered to provide in its charter for disannexation of territory within the procedural limitations of the Municipal Annexation Act. However, the Houston City Charter, which contains no rules pertaining specifically to disannexation, provides as follows:

> The city shall have all powers that are or hereafter may be granted to municipalities by the Constitution or laws of Texas; and all such powers, whether expressed or implied, shall be exercised and enforced in the manner prescribed by this Charter, or when not prescribed herein, in such manner as shall be provided by ordinance or resolution of the council.
>
> *In addition to all the powers enumerated in this Charter,* implied thereby or appropriate to the exercise thereof, *the city shall have and may exercise, in the manner hereinbefore provided, all other powers which, under the Constitution and laws of this State, it would have been competent for this Charter specifically to enumerate.*

CHARTER, HOUSTON, art. II §2(b) (emphasis added). Appellants contend that the broad reservation of power in the above section is a sufficient "rule" for the purposes of article 1175(2). On the basis of *Golston v. City of Tyler,* 262 S.W.2d 518 (Tex. Civ. App. — Texarkana 1953, writ ref'd), we agree. Nevertheless, the further restriction in article 1175(2) that the "rules" must be consistent with the procedures in the Municipal Annexation Act must be given effect.

The Municipal Annexation Act is embodied in article 970a, TEX, REV. CIV. STAT. ANN. (1963). Specifically as to disannexation, the act provides the following precedural requirements. If the annexing city fails to discharge its obligation to provide equivalent city services to the annexed area within three years of the date of annexation, a majority of the qualified

voters residing in the annexed area and the owners of fifty per cent of the land in the area may petition for disannexation. The statute requires notice of the petition to be posted for ten days in three public places in the annexed area and publication in a generally circulated newspaper serving the area prior to distribution of the petition for signatures. If the city fails to disannex within ninety days after receipt of a valid petition, any one or more of the petitioners may file in the district court for disannexation. If the district court then determines that the petition is valid, "it shall enter an order disannexing such particular annexed area." TEX. REV. CIV. STAT. ANN. art. 970a §10A and B (1963).

The relationship between article 1175(2) and article 970a §10 was the subject of *City of Hitchcock v. Longmire,* 572 S.W.2d 122 (Tex. Civ. App. — Houston [1st Dist.] 1978, writ ref'd n.r.e.). In that case the issue as expressed by the court was "whether citizens of a home rule city can repeal an annexation ordinance by referendum." The court reasoned that repeal of an annexation ordinance is substantially the same as disannexation of territory and held that "the governing body of city does not have the right to repeal an annexation ordinance or to adopt a disannexation ordinance without following the specific procedural requirements established in article 970a." *Id.* at 127. We conclude that articles 1175 and 970a §10 have withdrawn the subject matter of this ordinance, disannexation, from the field in which the initiatory process is operative.

Alternatively, appellants contend that at least a portion of the territory was subject to "discontinuance" through the initiative process pursuant to article 1266, TEX. REV. CIV. STAT. ANN. (1963). That article provides for disannexation of territory by city ordinance if the territory is unimproved, of a minimum acreage, and is "contiguous and adjoining the lines of the city." In this case the parties stipulated that the Clear Lake City area was composed of both improved and unimproved property. There was no such stipulation as to the size of the unimproved area or as to the adjacency of the tract to the city lines. Nor did appellants present any evidence on those issues so as to bring any portion of the territory within the requirements of ar-

ticle 1266.

Having found that disannexation, generally, has been withdrawn from the initiatory process, and having found appellants failed to comply with either article 970a or article 1266, we overrule appellants' first point of error. This renders it unnecessary for us to consider appellants' second point of error which complains that the trial court erroneously ruled that the boundary description of the area to be disannexed in the proposed ordinance fails to close.

The judgment of the trial court denying the writ of mandamus is affirmed.

Affirmed.

/s/ J. Curtiss Brown
Chief Justice

Judgment rendered, and Opinion filed June 20, 1979.

Panel consist of Chief Justice J. Brown and Associate Justices Coulson and Cire. (AJ Cire not participating).

JUDGMENT

RUDOLPH C. VARA, ET AL

VS. NO. B2007

CITY OF HOUSTON

"This cause, being an appeal from the judgment rendered and entered by the court below on July 21, 1978, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there is no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be affirmed in all things. It is further ordered that the appellants, Rudolph C. Vara, Dr. Clifton L. Washington, II, Edward Small, Marvin C. Delaney, Kathleen R. Douglas, Joel Luedeman, Ann Luedeman, and Linda Susan Jackson, and their surety, Lawyers Surety Corporation, jointly and/or severally, pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance."

NO. B2007

IN THE SUPREME COURT OF
THE STATE OF TEXAS
AUSTIN, TEXAS

RUDOLPH C. VARA, ET AL.,

Petitioners

VS.

CITY OF HOUSTON, ET AL,

Respondents

PETITIONERS' MOTION FOR RECONSIDERATION

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW Petitioners and file this Motion for Reconsideration, respectfully requesting this Honorable Supreme Court to Reconsider its previous refusal to grant Petitioners' Application for Writ of Error, and, as grounds therefor, would show the following:

Point II. THE COURT OF CIVIL APPEALS DECISION IN THIS CASE VIOLATES THE VOTING RIGHTS OF THE QUALIFIED VOTERS OF HOUSTON IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

The Charter of the City of Houston specifies conditions pursuant to which the qualified voters of Houston are entitled to vote in an election on the adoption of an ordinance properly initiated pursuant to the terms of the Charter. CHARTER,

HOUSTON, Article VIIb, Section 3. Petitioners complied with all procedural requirements for exercise of the initiative process under the Charter. Now, the Court of Civil Appeals would impose the requirement that, before an initiative election can be held within the City of Houston on a disannexation ordinance, the owners of a majority of the land previously annexed, as well as a majority of the voters in the area previously annexed, must approve the election by executing a petition in the manner prescribed by Article 970A, Section 10. This new requirement by the Court of Civil Appeals would prohibit the qualified voters of the City of Houston from exercising the franchise until a narrow category of persons, *i.e.*, landowners and voters in the area annexed, approved the election. Such restrictions on the right to vote contravene the Fourteenth Amendment to the Constitution of the United States of America. *Hill v. Stone,* 421 U.S. 289 (1975).

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioners respectfully pray that this Court grant the Application for Writ of Error in this cause to write an opinion which will provide a necessary guide to the municipalities and citizens of this State concerning the initiative process and the discretion of a municipality to correct a mistaken annexation.

Respectfully submitted:

LEONARD, KOEHN, ROSE & HURT,
a professional corporation

By: /s/ Tom Leonard
Tom Leonard

Attorneys For Petitioners

IN THE SUPREME COURT OF TEXAS

February 6, 1980

No. B-8737

Rudolph C. Vara ET AL	)	
	)	From HARRIS County,
vs.	)	
	)	FOURTEENTH District.
The City of Houston, ET AL	)	

Application of petitioners for writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, Rudolph C. Vara and Lawyers Surety Corporation as surety, pay all costs incurred on this application.

March 12, 1980

No. B-8737

Rudolph C. Vara ET AL	)	
	)	From HARRIS County,
vs.	)	
	)	FOURTEENTH District.
The City of Houston ET AL	)	

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true

and correct copy of the order of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 23rd day of May, 1980.

GARSON R. JACKSON, Clerk

(SEAL) By: /s/ Richard P. Braun , Deputy.
Richard P. Braun

NO. 2007

IN THE COURT OF CIVIL APPEALS FOR THE FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS AT HOUSTON

RUDOLPH C. VARA, ET AL,

Appellants,

V.

CITY OF HOUSTON, ET AL,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Rudolph C. Vara, et al, the appellants above-named, hereby appeal to the Supreme Court of the United States from the judgment of the Court of Civil Appeals affirming the denial of the writ of mandamus entered in this action on June 20, 1979. Said judgment became final upon denial of appellant's motion for reconsideration by the Supreme Court of the State of Texas entered in this action on March 12, 1980.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

LEONARD, KOEHN, ROSE & HURT,

By: /s/ Tom Leonard

Tom Leonard
2001 Bryan Tower
Suite 751
Dallas, Texas 75201
(214) 651-1031

Attorneys For Petitioners

PROOF OF SERVICE

I, Tom Leonard, an attorney in the office of Leonard, Koehn, Rose & Hurt, attorneys for Rudolph C. Vara, et al, appellants herein, depose and say that on the 27th day of May, 1980, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on the City of Houston, et al, appellees, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorney of record, Charles Williams, City of Houston, Legal Department, P.O. Box 1562, Houston, Texas 77001. I further depose and say that all parties required to be served have been served.

/s/ Tom Leonard
Tom Leonard
Attorney for Petitioners

Subscribed and sworn to before me at Dallas, Dallas County, Texas this 27th day of May, 1980.

/s/ Yvonne Hodges
Notary Public in and for
(SEAL) *Dallas County, Texas*

My Commission Expires:

7/19/81

Court of Civil Appeals
14th Supreme Judicial District
Civil Courts Building
Houston, Texas 77002

May 30, 1980

Hon. Thomas W. Leonard
Leonard, Koehn, Rose, Webb & Hunt
6750 West Loop South
Suite 150
Bellaire, Texas 77401

Hon. Edward A. Cazares, City Atty.
Hon. Charles Williams, Asst.
City of Houston, P.O. Box 1562
Houston, Texas 77001

Re: B2007 — Rudolph C. Vara, et al v. City of Houston, et al, from Harris

Gentlemen:

Please be advised that on this date in the above cause appellants' notice of appeal to the Supreme Court of the United States was received and filed.

Respectfully,

/s/ Thelma Mueller

Thelma Mueller, Clerk

TM:rbf

PROOF OF SERVICE

I, Chris Ryman, an attorney in the office of Leonard, Koehn, Rose & Hurt, attorneys for Rudolph C. Vara, et al, Appellants herein, depose and say that on the 6th day of June, 1980, I served a copy of the foregoing Jurisdictional Statement on the City of Houston, et. al, Appellees, by mailing three copies in a duly addressed envelope, with first class postage prepaid, to their attorney of record, Charles Williams, City of Houston, Legal Department, P.O. Box 1562, Houston, Texas 77001. I further depose and say that all parties required to be served have been served.

Chris Ryman

Chris Ryman

Subscribed and sworn to before me at Dallas, Dallas County, Texas this 6th day of June, 1980.

Yvonne Hodges

Notary Public in and for
Dallas County, Texas

My Commission Expires:

7/19/81